INDEX.

TABLE OF CITATIONS.

Cases:

Statute:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1395.

UNITED STATES OF AMERICA,

Petitioner,

v.

GEORGE J. WILSON, JR.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Philip D. Lauer, Esquire, counsel appearing on behalf of the Respondent, George J. Wilson, Jr., hereby presents Respondent's brief in opposition to Petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit in this case.

Respondent relies on the statements of the Petitioner with respect to the opinions below, jurisdiction, questions presented, constitutional provision and statute involved, and statements of facts.

REASONS FOR DENYING THE WRIT.

The Criminal Appeals Act, 18 U. S. C. 3731, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, provides for appeals by the United States from orders of the District Court terminating criminal prosecutions in all cases in which an appeal would not violate the Double Jeopardy Clause.

The holding of the Court of Appeals in this matter constitutes a well-reasoned and predictable application of the appropriate legal principles, and does not, as alleged by Petitioner, mark a "substantial departure from prior holdings of this Court" and others. Rather, the application of the Double Jeopardy Clause, the Criminal Appeals Act, and the federal law with regard to acquittals have come together to produce varying results, depending upon the factual contexts to which they are applied. These results do not demonstrate, as alleged by Petitioner, any conflict among the Courts of Appeals over their appellate jurisdictions, but rather represent the disparity which must be expected by reason of the factual variations.

1. There appears no meaningful conflict among the Courts of Appeals regarding the appealability of a post-conviction order dismissing an indictment. The various Courts of Appeals have resolved the problem of the appealability of each such order by a careful consideration in each case of the applicability of the Double Jeopardy Clause. The achievement of different results in different factual settings has been mistaken by the Government for confusion in the principles applied.

In *U. S. v. Zisblatt,* 172 F. 2d 740 (C. A. 2), appeal dismissed, 336 U. S. 934, the Court of Appeals for the Second Circuit specifically did not hold, as stated by the Petitioner, that an appeal from a post-conviction order of the District

Court dismissing an indictment under the Statute of Limitations was not barred by the Double Jeopardy Clause. Rather, that Court held that they had no jurisdiction to hear the appeal, and certified the case to the Supreme Court. Judge Learned Hand characterized the decision of the District Court as a judgment sustaining a "special plea in bar", and thus potentially appealable directly to the Supreme Court. Judge Hand also recognized a potential Double Jeopardy claim:

> "However, . . . the motions, which he did entertain and eventually granted, were all made after the trial had begun and, therefore, after the Defendant had—literally at any rate—'been put in jeopardy.' There is, therefore, a good argument for saying that no appeal lies to the Supreme Court." (172 F. 2d at 742).

U. S. v. Weinstein, 452 F. 2d 704, cert. denied, *sub nom. Grunberger v. U. S.,* 406 U. S. 917, demonstrates no disparity in this area between the Second Circuit and any other Circuit. In that case, the Second Circuit Court of Appeals granted a petition by the Government for writ of mandamus to the trial Judge, directing him to vacate his post-verdict, post-conviction order dismissing the indictment. In so doing, the Court specifically found that there had been no acquittal, and did so using the principles enunciated in *U. S. v. Sisson,* 399 U. S. 267. The factual bases for such a finding were obvious: a judgment of conviction had been entered prior to the Judge's order; the Judge himself repeatedly refused to acquit the Defendant; the Judge stated his correct belief that he had no "right" to direct acquittal for the reasons stated. Looking "at what (the) District Court did rather than at what it said it was doing", *U. S. v. Sisson,* 399 U. S. at 270, the Court found that no acquittal had been accomplished and that no double jeopardy would ensue from its order.

Among the more recent pronouncements of the Court of Appeals for the Second Circuit, and demonstrating that that Court has applied these doctrines according to the facts of each case, are *U. S. v. Jenkins,* 490 F. 2d 868 (C. A. 2), and *U. S. v. Velazquez,* C. A. 2, decided December 28, 1973, 14 Cr. L. 2330. In the former case, the Defendant was tried without jury, following which the trial Judge dismissed the indictment. The Court of Appeals, after noting that Congress intended to liberally allow appeals by the Government unless prevented by the Double Jeopardy Clause, presented an exhaustive discussion of the Double Jeopardy Clause. After reviewing *U. S. v. Sisson, supra,* at length, the Court of Appeals held:

> "In essence the Judge's post trial ruling in *Sisson* had made the jury trial a nullity and had resulted in a trial to the Judge, who had rendered a judgment of acquittal on the merits. Even though this action was based on an erroneous legal ground, the Double Jeopardy Clause prevented a new trial. . . .
>
> Although the District Judge here characterized his action as a dismissal, it is clear from the analysis in *Sisson* that for double jeopardy purposes he acquitted the Defendant. His ruling was based upon facts developed at trial, which were not apparent on the face of the indictment, and which went to the general issue of the case. The dissent here contends that the District Court's findings of fact were largely undisputed and not relevant to the pivotal legal issue in question. However, the discussion section of the District Court's opinion makes it clear that it was relying on the precise circumstances of Jenkins' case to conclude that the Supreme Court's decision . . . should not be applied retroactively to him. The District Court was not construing the statute . . . it was holding that the statute

should not be applied to him as a matter of fact." *U. S. v. Jenkins, supra,* at 878.

In *U. S. v. Valazquez, supra,* the same Court held that an appeal would lie, because jeopardy had not attached when the indictment was dismissed solely on motions submitted and decided prior to trial. Thus, the significant inquiry in each case has been whether the Defendant has been placed in jeopardy, a question whose answer must and did depend on the manner and time of termination of the proceedings in the Trial Court.

In *U. S. v. Whitted,* 454 F. 2d 642 (C. A. 8), the Petitioner has presented another example of a Court applying identical legal principles in the identical manner. That the result is again different from that rendered by the Third Circuit Court of Appeals is, once again, a function of the presence of substantially different circumstances. In *Whitted,* the Eighth Circuit Court of Appeals was confronted with a dismissal by a District Judge of an indictment entirely on the basis of facts before him at the time of a pre-trial denial of a similar motion. No reliance on trial testimony was shown. Clearly, this was not an acquittal, since an acquittal has been defined in such cases as "a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . ." *U. S. v. Jorn,* 400 U. S. 470, 478, n. 7 (1971).

In *U. S. v. McFadden,* 462 F. 2d 484 (C. A. 9), the Court of Appeals for the Ninth Circuit considered a similar dismissal of an indictment. In that case, finding that the Trial Court had dismissed the indictment on the basis of evidence produced at trial, the Court of Appeals held that the Court had acquitted Defendant, and that he could not be retried.

In *U. S. v. Esposito,* — F. 2d — (No. 72-1825, June 12, 1973), the Court of Appeals for the Seventh Circuit allowed

an appeal. However, as noted in the opinion of the Court below (Petitioner's brief, App. B., Page 8A), that Court stressed its application of the principles of *U. S. v. Sisson, supra,* but found no reliance by the Trial Judge on trial evidence in his order. See also *U. S. v. Ponto,* 454 F. 2d 647.

The holding of the Court of Appeals in the instant matter applies the same principles utilized by other Courts of Appeals in the same manner. There exists no conflict which requires resolution in this matter. The results reached by the other Courts of Appeals cited by the Government and herein were amply justified on their facts, and the principles applied require no further amplification or explanation.

2. The contentions of Petitioner with regard to the alleged misconstruction of the opinion of this Court in *U. S. v. Sisson, supra,* by the Court below are likewise without merit.

Basically, *Sisson* involved a determination that a District Judge's decision did not constitute a motion in arrest of judgment, but an acquittal.

In so holding, the Court stated the following (399 U. S. at 289-290):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting (the defendant) twice in jeopardy, and thereby violating the Constitution * * *. (I)n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," *United States v. Ball,* 163 U. S. 662, 671 (1896).

Having established this standard, this Court held that the decision before it was an acquittal (399 U. S. at 288-289):

> The same reason underlying our conclusion that this was not a decision arresting judgment—i.e., that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

Accepting these principles, the Petitioner nonetheless argues that the decision of the District Judge herein cannot be characterized as an acquittal. Such a view of the District Court's decision in this matter clearly ignores the reliance by the District Court on facts adduced at the trial, as set forth in the District Court's opinion, and reprinted in the opinion of the Court below:

> The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer . . . During the trial (N. T. 133-134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N. T. 164-165).
>
> On the (g)overnment's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N. T. 62). . . . Other testimony established that Mr. Wilson controlled the union (N. T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant (N. T. 80, 181).
>
> . . . The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the govern-

> met contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. (Petitioner's brief, Appendix B, Page 7A).

Although the District Court labeled the relief granted as a dismissal of the indictment, we are cautioned by *U. S. v. Sisson, supra,* at 279, to be guided by the legal effect of the Court's decision, and not the name given it.

Clearly, the decision of the District Court was an acquittal, and *U. S. v. Sisson* was properly applied.

3. The Petitioner next contends that there is no basis for holding that the Double Jeopardy Clause bars an appeal where a verdict of guilty has been entered, and the Petitioner seeks only to correct a legally erroneous order, even if it be characterized as an acquittal.

Petitioner's reliance on *U. S. v. Kepner,* 195 U. S. 100, is misplaced. *Kepner* held that an acquittal on the general issue barred an Appellate Court from entering a judgment of conviction on appeal. As noted in *U. S. v. Jenkins, supra,* at 880:

> "Since under Philippine practice no further proceedings were required below, the decision belies any view that the Double Jeopardy Clause protects only against the vexation of a second trial. (*Fong Foo v. U. S.,* 369 U. S. 141) held that a directed acquittal barred a retrial even when it was plain that the acquittal was occasioned by clear error of the Judge. (*U. S. v. Sisson,* supra) held that when a guilty verdict had been nullified by a Judge's decision to acquit on the merits, the Double Jeopardy Clause prevented an Appellate Court from directing the entry of a judgment of conviction."

Despite the amendment to Section 3731, it is apparent that an appeal will not lie where the Double Jeopardy Clause would prevent further prosecution. *Sisson* has specifically held an "acquittal", as therein defined, to be such an event, and there appears no logical reason to conclude that the definition of "acquittal" set forth by Justice Harlan should be disturbed. That the Petitioner may be precluded from seeking a reversal of what it alone deems an erroneous order is but a necessary by-product of the zealous protection afforded the Double Jeopardy Clause by the Courts of this country.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP D. LAUER,
Counsel for Respondent.